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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

LESLIE ANDREWS et al.,

Plaintiffs and Appellants,

v.

WILLIAM GILLESPIE,

Defendant and Respondent.

E053880

(Super.Ct.No. RIC466688)

OPINION

APPEAL from the Superior Court of Riverside County. John Vineyard, Judge.  
Affirmed.

Equity Law Group and Lotfy Mrich for Plaintiffs and Appellants.

Brown & Ritner and Deanna M. Brown for Defendant and Respondent.

Plaintiffs and appellants Leslie Andrews and Holly Fallon (plaintiffs) appeal from a summary judgment in favor of defendant William Gillespie, M.D., in a lawsuit alleging the wrongful death of their 18-year-old son, Eric Andrews. The trial court denied plaintiffs' request to continue the summary judgment motion because plaintiffs failed to

specify what admissible evidence they expected to be able to obtain if the continuance were granted. The trial court granted the summary judgment motion because plaintiffs failed to produce admissible evidence showing the existence of triable issues of material fact concerning plaintiffs' claims that the medical care Gillespie provided their son fell below the applicable standard of care.

We will affirm the judgment.

### FACTUAL AND PROCEDURAL HISTORY

Plaintiffs' operative fourth amended complaint alleged multiple causes of action arising from the death of plaintiffs' 18-year-old son, Eric Andrews (Eric). The complaint alleged that Eric was shot and killed by Riverside County Sheriff's deputies on February 28, 2006, following a 911 call by plaintiff Holly Fallon saying that her son needed help. Eric had been admitted to Aurora Charter Oak Hospital earlier in February on an involuntary hold after threatening suicide. He was suicidal because of the break-up of his relationship with a girlfriend. The complaint alleges that Eric was negligently discharged from the hospital by his attending physician, William S. Gillespie.<sup>1</sup>

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<sup>1</sup> Plaintiffs did not include the operative fourth amended complaint in the record on appeal. Consequently, we have taken the factual history from our opinion in the related case of *Andrews, et al. v. Aurora Charter Oak Hospital* (Sept. 18, 2012, E053311) [nonpub. opn.]. In that case, we affirmed the summary judgment in favor of Aurora Charter Oak Hospital on the wrongful death cause of action, based on the evidence that Gillespie was not an employee of the hospital. Demurrers as to other causes of action were sustained without leave to amend. (*Id.* [at pp. 1-2].)

Gillespie brought a motion for summary judgment as to the single remaining cause of action alleged against him, for medical malpractice and wrongful death. The trial court granted the motion, and judgment was entered for Gillespie.

Plaintiffs filed a timely notice of appeal.

## LEGAL ANALYSIS

### 1.

#### SUMMARY JUDGMENT WAS PROPERLY GRANTED

##### *Standard of Review*

We review orders granting motions for summary judgment de novo, applying the same rules the trial court was required to apply in deciding the motion. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 753.)

A defendant moving for summary judgment has the burden of demonstrating as a matter of law, with respect to each of the plaintiff's causes of action, that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2);<sup>2</sup> *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) If a defendant's moving papers will support a finding in its favor on one or more elements of the cause of action or on a defense, the burden shifts to the plaintiff to present evidence showing that a triable issue of material fact actually exists as to those elements or the defense. (*Aguilar*, at p. 849.) In order to meet that burden, "[t]he plaintiff . . . may not rely upon the mere allegations

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<sup>2</sup> All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

or denials’ of his ‘pleadings to show that a triable issue of material fact exists but, instead,’ must ‘set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.’ [Citation].” (*Ibid.*, quoting former § 437c, subd. (o)(2), now subd. (p)(2).) Further, the opposing party must produce admissible evidence demonstrating the existence of a triable issue of material fact. (§ 437c, subds. (d), (p).) We review a trial court’s evidentiary rulings on summary judgment for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

*Plaintiffs Did Not Meet Their Burden of Producing Evidence That Gillespie’s Care of Their Son Fell Below the Applicable Standard of Care.*

To prevail on a cause of action for medical negligence, a plaintiff must adduce the testimony of an expert witness to establish the standard of care against which a medical practitioner’s actions are measured and that the practitioner’s care fell below that standard, resulting in injury or death: “““The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations], unless the conduct required by the particular circumstances is within the common knowledge of the layman.” [Citations.]’ [Citations.]” (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.)

In support of his motion, Gillespie submitted the declaration of an expert, Louis Alvarez, M.D. The trial court found Alvarez’s declaration sufficient to sustain Gillespie’s burden of proof in establishing that the care he provided was within the

applicable standard of care and was not the legal cause of Eric's death, and implicitly found that the declaration was sufficient to shift the burden of proof to plaintiffs to produce evidence that Gillespie's care was not within the applicable standard of care and was the legal cause of Eric's death.

Plaintiffs did not include Alvarez's declaration in the record on appeal. It is the plaintiffs' burden to produce a record on appeal which clearly demonstrates error.

(*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) The omission of Alvarez's declaration leaves us with no basis upon which to reach any conclusion other than that the trial court properly found that the burden shifted to plaintiffs.

Plaintiffs also did not produce a declaration of a medical expert which controverted the declaration of Gillespie's expert. On appeal, plaintiffs appear to contend that such a declaration was unnecessary because Gillespie's alleged negligence in discharging Eric prematurely was an obvious mistake to which a layman could testify. However, "The 'common knowledge' exception is principally limited to situations in which the plaintiff can invoke the doctrine of *res ipsa loquitur*, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.' [Fn. omitted] [Citation.] The classic example, of course, is the X-ray revealing a scalpel left in the patient's body following surgery. [Citation.]" (*Flowers v. Torrance Memorial Hospital Medical Center, supra*, 8 Cal.4th at p. 1001.) Plaintiffs did not cite any evidence or authority which supports the contention that it would be obvious to a layman that Gillespie discharged Eric prematurely or that it was reasonably

foreseeable to a layman that discharging him at that point in his treatment would be likely to lead to his injury or death.<sup>3</sup> Accordingly, the trial court did not err in finding that plaintiffs failed to meet their burden of showing the existence of a triable issue of material fact.

2.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
PLAINTIFFS' REQUEST FOR A CONTINUANCE FOR FURTHER DISCOVERY

In their opposition to the motion, plaintiffs stated that the court could, as an alternative to granting summary judgment, issue an order approving plaintiffs' application to conduct further discovery. The trial court denied the request because plaintiffs failed to submit a declaration which satisfied the requirements of section 437c, subdivision (h).

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<sup>3</sup> Section 437c, subdivision (b)(3), provides: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. *Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.*" (Italics added.) Further, rule 3.1350(f) of the California Rules of Court provides that citations to the evidence in support of a disputed fact "must be supported by citation to exhibit, title, page, and line numbers in the evidence submitted."

The only evidence plaintiffs cited in their opposition to the motion and their statement of disputed and undisputed material facts was Gillespie's deposition testimony. In most instances, they did not cite to a specific page and line from his deposition, and many of their asserted "facts" are supported only by their attorney's opinion.

In pertinent part, section 437c, subdivision (h), provides: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.” A continuance is “virtually mandated” upon a proper showing. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.)

It is not clear whether plaintiffs filed a separate motion for a continuance. If they did, it is not in the record. In any event, the declaration of counsel which is in the record on appeal, attached to the opposition to the summary judgment motion, does not meet the requirements of section 437c, subdivision (h). In his declaration, counsel stated only that he had “scheduled multiple contacts to obtain expert witnesses that will lend more credence to our malpractice, negligence, and wrongful death causes of action” but that “the expert witnesses have failed to materialize by the deadline date [for] this pleading.” The original complaint in this case was apparently filed on February 27, 2007. If counsel had not been able in over four years to find an expert who would support his case, it does not appear that “facts essential to justify opposition [to the summary judgment motion] may exist.” (§ 437c, subd. (h).) On the contrary, it appears that such facts do not exist. Accordingly, the court did not abuse its discretion in denying the continuance.

DISPOSITION

The judgment is affirmed. William Gillespie is awarded costs on appeal.

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McKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.